RECORD AND BRIEFS

No. 15-1194

Supreme Court, U.S.
FILED
DEC 22 2016
OFFICE OF THE CLERK

In the
Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,

v.

NORTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF *AMICUS CURIAE* ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS; NATIONAL ASSOCIATION FOR RATIONAL SEXUAL OFFENSE LAWS AND NORTH CAROLINA RSOL IN SUPPORT OF PETITIONER AND REVERSAL

John J. Korzen
Counsel of Record
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
Appellate Advocacy Clinic
Post Office Box 7206
Reynolda Station
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

Counsel for Amicus Curiae

GibsonMoore Appellate Services, LLC
206 East Cary Street • Richmond, VA 23219
804-249-7770 • www.gibsonmoore.net

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. REGULATIONS SEEKING TO PREVENT SEXUAL OFFENSES SHOULD BE BASED ON THE EMPIRICAL REALITIES OF SEXUAL OFFENDING 5

A. Registrants are not a homogenous group of "sex offenders" and should not be regulated as such 7

B. Individualized risk assessments and tailored legislation recognize the realities of sex offending 12

C. Individualized policies and targeted legislation increase public safety and maximize the use of public resources 15

II. FORBIDDING ALL REGISTRANTS FROM ACCESSING SOCIAL MEDIA DEMONSTRATES AN OVERBROAD AND INEFFECTIVE APPROACH TO PREVENTING SEXUAL OFFENSES 17

A. The statute's overbreadth stems from legislating with misconceptions rather than evidence 17

B. The statute's overbreadth has damaging collateral consequences and impedes registrants' success at reintegrating into society.....20

CONCLUSION.....23

TABLE OF AUTHORITIES

Page(s):

Cases:

Ashcroft v. Free Speech Coal.,
535 U.S. 234 (2002) 20

Bartnicki v. Vopper,
532 U.S. 514 (2001) 5

Butler v. Michigan,
352 U.S. 380 (1957) 17

Connecticut Department of Public Safety v. Doe,
538 U.S. 1 (2003) 1

Doe v. Cooper,
No. 16-1596, 2016 WL 6994223
(4th Cir. Nov. 30, 2016) 19

Doe v. Sex Offender Registry Bd.,
41 N.E.3d 1058 (Mass. 2015) 13

Doe v. Snyder,
834 F.3d 696 (6th Cir. 2016) 8

FEC v. Colo. Republican Fed. Campaign Comm.,
533 U.S. 431 (2001) 5

Greenholtz v. Inmates of Neb. Penal & Corr. Complex,
442 U.S. 1 (1979) 12

Kansas v. Crane,
534 U.S. 407 (2002) 1

Kansas v. Hendricks,
521 U.S. 346 (1997) 1, 15

Police Dep't of Chicago v. Mosley,
408 U.S. 92 (1972).....15

Schall v. Martin,
467 U.S. 253 (1984).....12

Smith v. Doe,
538 U.S. 84 (2003).....7, 9

State v. Packingham,
748 S.E.2d 146 (N.C. Ct. App. 2013),
2013 WL 1232022 20-21

State v. Pell,
712 S.E.2d 189 (N.C. Ct. App. 2011).....15

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994).....19

Williams v. New York,
337 U.S. 241 (1949).....12, 15

Statutes:

N.C. Gen. Stat. § 14-202(*l*).....14

N.C. Gen. Stat. § 14-202.5 .....3. 5

N.C. Gen. Stat. § 14-208.5 2

N.C. Gen. Stat. § 14-208.6(6).....14

N.C. Gen. Stat. § 14-208.18 3

N.C. Gen. Stat. § 14-208.18(a)(2).....19

Tex. Gov't Code Ann. § 508.1861(a) (West 2016).....14

Constitutional Provision:

U.S. Const. amend I .....*passim*

Other Authorities:

Andrew J. Harris & Kelly M. Socia,
What's in a Name? Evaluating the Effects of the "Sex Offender" Label on Public Opinions and Beliefs,
28 Sexual Abuse 660 (2016) 7

Andrew J.R. Harris & R. Karl Hanson,
Sex Offender Recidivism: A Simple Question
8 (2004), https://goo.gl/nMoErU 11

Anthony R. Beech, *et al.*,
The Internet and Child Sexual Offending: A Criminological Review,
13 Aggression & Violent Behav. 216 (2008) 13

Bureau of Justice Statistics, Dep't of Justice,
Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics
10 (2000), https://goo.gl/o5xnv9 18

Cal. Sex Offender Mgmt. Bd.,
Recidivism of Paroled Sex Offenders – A Five (5) Year Study
1 (2008), https://goo.gl/esBX7G 10

Cal. Sex Offender Mgmt. Bd.,
Recidivism of Paroled Sex Offenders – A Ten (10) Year Study
1 (2008), https://goo.gl/UwnD10 10

Center for Sex Offender Management,
Twenty Strategies for Advancing Sex Offender Management in Your Jurisdiction
8 (2008) https://goo.gl/gg9iB7 14

Christopher Lobanov-Rostovsky & Andrew J. Harris, *Reconciling Sexual Offender Management Policy, Research, and Practice*, in *Sexual Offending* 843 (Amy Phenix & Harry M. Hoberman eds., 2016).....7, 13, 16

Christopher Lobanov-Rostovsky, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Adult Sex Offender Management* 1 (2015), https://goo.gl/Bm4Pca.....6

Citizens Alliance on Prisons & Public Safety, *Denying Parole at First Eligibility: How Much Public Safety Does It Actually Buy? A Study of Prisoner Release and Recidivism in Michigan* 21 (2009), https://goo.gl/ZRdEOM.....10

Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 Harv. C.R.-C.L. L. Rev. 435 (2010).....8

Criminal Justice & Policy Planning Div., State of Conn., *Recidivism Among Sex Offenders in Connecticut* 4 (2012), https://goo.gl/ZUcj0T.....10

Gwenda M. Willis, Jill S. Levenson & Tony Ward, *Desistance and Attitudes Towards Sex Offenders: Facilitation or Hindrance?*, 25 J. Fam. Violence 545 (2010).....7, 20

Indiana Dep't of Corr., *Recidivism Rates Compared: 2005 – 2007*, 21–22 (2009), https://goo.gl/17NwK7.....10

Janis Wolak, David Finkelhor, Kimberly J. Mitchell, & Michele L. Ybarra, *Online "Predators" and Their Victims: Myths, Realities, and Implications for Prevention and Treatment*, 63 Am. Psychologist 111 (2008) 18

Jill S. Levenson, *An Evidence-Based Perspective on Sexual Offender Registration and Residential Restrictions*, in *Sexual Offending* 861 (Amy Phenix & Harry M. Hoberman eds., 2016) 16

Joan Tabachnick & Alisa Klein, Association for Treatment of Sexual Abusers, *A Reasoned Approach: Reshaping Sex Offender Policy to Prevent Child Sexual Abuse* 26 (2011), https://www.atsa.com/pdfs/Policy/AReasonedApproach.pdf 20

Lynn A. McFarland & Robert E. Ployhart, *Social Media: A Contextual Framework to Guide Research and Practice*, 100 J. Applied Psychol. 1653 (2015) 20

Michael Seto, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Internet-Facilitated Sexual Offending* 4 (2015), https://goo.gl/kFLiXM 12

Minn. Dep't of Corr., *Sex Offender Recidivism in Minnesota* 21 (2007), https://goo.gl/cXqYDR 10

N.C. Dep't of Justice,
The North Carolina Sex Offender & Public Protection Registration Programs 25–30 (2014), https://goo.gl/DMpIrB 8

Nicole Colombino, *et al.*, *Preventing Sexual Violence: Can Examination of Offense Location Inform Sex Crime Policy?*, 34 Int'l J. L. & Psychiatry 160 (2011) 18

Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Sex Offender Management Assessment and Planning Initiative* xiii (2014), https://goo.gl/LmYQOp ..... *passim*

Pamela M. Yates,
Treatment of Sexual Offenders: Research, Best Practices, and Emerging Models, 8 Int'l J. Behavioral Consultation & Therapy 89 (2013) 16

Patrick A. Langan, *et al.*,
Bureau of Justice Statistics,
Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994* (2003), https://goo.gl/nLe1BA 9, 10

Paul H. Robinson, *et al.*,
The Disutility of Injustice,
85 N.Y.U. L. Rev. 1940 (2010) 17

Roger Przybylski, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Recidivism of Adult Sexual Offenders* 1–2 (2015), https://goo.gl/bJ3nx2 8

State of New York, Dep't of Corr. & Cmty. Supervision, *2010 Inmate Releases: Three Year Post Release Follow-Up* 46–47 (2014), https://goo.gl/cC9EIQ 10

Wash. State Inst. for Pub. Policy, *Sex Offender Sentencing in Washington State: Recidivism Rates* 2 (2005), https://goo.gl/LRLQGi 10

INTEREST OF AMICI CURIAE[1]

The Association for the Treatment of Sexual Abusers ("ATSA") is an international, multi-disciplinary professional association dedicated to the research and prevention of sexual assault. ATSA's membership includes leading researchers in the study of sexual violence as well as professionals who evaluate and treat sexual offenders, sexually violent predators, and victims. Members work closely with public and private organizations such as prisons, probation departments, law enforcement agencies, child protection services, prosecutors, public defender's offices, victim advocacy groups, and state legislatures to enhance awareness of and protection from sexual assault. ATSA advocates for evidence-based practices and policies that seek to protect the public from sexual violence while allowing for the rehabilitation of sexual offenders. ATSA's interest in this case is to offer a uniquely informed perspective on the current research regarding the diagnosis and treatment of sexual offenders as a means of ensuring that legislation targeting them is sound. ATSA has previously appeared as amicus curiae in several of this Court's cases, including *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003); *Kansas v. Crane*, 534 U.S. 407 (2002); and *Kansas v. Hendricks*, 521 U.S. 346 (1997).

The National Association for Rational Sexual Offense Laws ("NARSOL") is a national nonprofit organization exclusively dedicated to advocating for

---

[1] This brief was written by counsel for amici and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

rational, evidence-based sexual offense prevention policies. NARSOL promotes legislation that targets harmful *acts*, and it is dedicated to defending the constitutional rights of American citizens and their families who suffer damaging collateral consequences as a result of overbroad sexual offense laws. NARSOL holds several conferences across the United States each year promoting its values of public safety and tailored sexual offense legislation. NARSOL's interest in this case is to provide a practical perspective on the difference between targeted legislation that seeks to reduce recidivism based on evidence, and overbroad legislation that impacts registrants who have successfully completed their sentences.

North Carolina RSOL (NCRSOL) is an affiliate of NARSOL and represents more than 17,000 registrants in North Carolina, all of whom are subject to the State's social networking ban. NCRSOL's advocacy efforts have been largely constrained by the ban, as its leaders are unable to use social media as a means of engaging the public and declaring its legal and political objectives.

* * *

Amici submit this brief to provide an empirical and practical context for the Court's review of whether the social media ban that North Carolina imposes on all registrants violates the First Amendment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

No one disputes North Carolina's "paramount governmental interest" in protecting minors from sexual abuse. N.C. Gen. Stat. § 14-208.5. The problem, however, is North Carolina's approach to

regulating the conduct of its residents who appear on the State's sex offender registry. In addition to restricting registrants' employment, travel, housing, and parenting, *see, e.g.*, N.C. Gen. Stat. § 14-208.18, North Carolina forbids all registrants from accessing certain social networking websites, *id.* § 14-202.5, including several websites that primarily "provide both a forum for gathering information and a means of communication." Pet. App. 9a.

Petitioner persuasively argues that this statute sweeps far too broadly to withstand any sort of First Amendment scrutiny, "punish[ing] vast amounts of protected activity to reach the miniscule fraction that implicates the government's purpose." Pet. Br. 16. This brief highlights the lack of fit between the government's goals and its means of achieving them.

I. There is universal agreement among professionals that restrictions on registrants must have some basis in empirical reality to be effective. One such reality is the fact that registrants are not a homogenous group of "sex offenders" that should be monolithically managed. Rather, registrants comprise a diverse group of individuals, each different from the next in terms of past criminal history, behavioral patterns, and risk of recidivism. On top of the fact that the observed recidivism rates for "sex offenders" in the aggregate are far lower than what conventional folk wisdom suggests, differences in recidivism risk among the diverse registrant population require a tailored rather than uniform approach to crime prevention.

In place of "one-size-fits-all" legislation, individualized risk assessments are commonly used to identify registrants who pose an actual risk of

committing future harm. These risk assessments consider several variables that isolate and separate the risk of future harm from past offenses, allowing preventive legislation to then be tailored to target high-risk individuals.

Unlike overbroad and unfocused legislation—which has been shown to increase the risk of recidivism—targeted legislation allows registrants to successfully reenter with society, thereby reducing their risk of recidivism. Targeted legislation also makes fiscal sense, as it directs public resources to programs that are actually effective at preventing future harm rather than those that have little to no impact at all.

II. North Carolina's social networking ban is a prime example of an overbroad and ineffective approach to crime prevention.

Rather than relying on evidence, the State relies on misconceptions about sex offenders. The goal of the statute is to protect minors from having their information "harvested" from social networking sites, but it does very little to achieve it. Imposing the restriction on all registrants ignores the fact that a substantial portion of the registrant population appears on the registry for reasons that have nothing to do with minors or social networking. It also ignores widely-accepted data that (1) most victims of sexual crimes know their attacker; (2) most victims live with their attacker; and (3) most attacks are committed by first-time offenders, not registrants. The State cannot simply invoke its compelling interest in protecting minors to explain how the statute will in fact accomplish that goal.

The overbreadth of this statute causes significant collateral harm. It not only cuts off registrants from expressing their thoughts on Facebook, reading the news from nytimes.com, or even engaging in a political dialog with Donald Trump on Twitter. It also denies registrants access to what have become ubiquitous avenues of social interaction, stunting their ability to successfully reenter society. Whether it's creating a Facebook page to advertise a new startup company, keeping up with the school bus schedule on Twitter, or connecting with a new employer on LinkedIn, social networking websites have revolutionized the way people connect with one another. Participating in these networks maximizes registrants' chances of leading normal and successful lives; banning them compromises those chances significantly.

N.C. Gen. Stat. § 14-202.5 violates the First Amendment, and the judgment below should be reversed.

ARGUMENT

I. Regulations Seeking To Prevent Sexual Offenses Should Be Based On The Empirical Realities Of Sexual Offending.

The effectiveness of crime prevention policies hinges on their basis in empirical reality. That is especially true for policies that intrude on constitutionally-protected freedoms. *See, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514, 530–31 (2001) (finding "no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions"); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 474 (2001) (Thomas, J., dissenting) ("'[W]e have

never accepted mere conjecture as adequate to carry a First Amendment burden.' Some 'quantum of empirical evidence [is] needed to satisfy heightened judicial scrutiny of legislative judgments.'" (citations omitted)). Nevertheless, "[d]espite the intuitive value of using science to guide decisionmaking, laws and policies designed to combat sexual offending are often introduced or enacted in the absence of empirical support."[2] These policies are frequently rushed, relatively uninformed, and even faddish in response to extreme cases.

As the Department of Justice has repeatedly stressed, "crime control and prevention strategies—including those targeting sex offenders—are far more likely to be effective and cost-beneficial when they are based on scientific evidence about what works."[3] Although researchers can disagree about what works best, there is unanimous professional consensus about what does *not* work—regulating registrants as a homogeneous group with "one-size-fits-all" legislation. For crime prevention legislation to work, individualized risk assessments and tailored, evidence-based policies are necessary.

---

[2] Christopher Lobanov-Rostovsky, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Adult Sex Offender Management* 1 (2015), https://goo.gl/Bm4Pca.

[3] Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Sex Offender Management Assessment and Planning Initiative* xiii (2014) [hereinafter SMART Report], https://goo.gl/LmYQOp.

A. Registrants are not a homogenous group of "sex offenders" and should not be regulated as such.

Crime prevention policies that target registrant conduct often rest on a false premise: that "sex offenders" are a homogenous group ripe for uniform regulation. This "myth of homogeneity" permeates policymaking decisions despite universal agreement that registrants comprise a heterogeneous collection of individuals who vary widely in "offense profiles, behavioral patterns, motivations, and risks of re-offense."[4] Gliding over these differences using a "one-size-fits-all" approach ignores "the heterogeneity of sexual offenders and overmanages some sexual offenders unnecessarily."[5] *See Smith v. Doe*, 538 U.S. 84, 117 (2003) (Ginsburg, J., dissenting) ("However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.").

1. The phrase "sex offender" itself is not an empirical category; it merely represents a *legal* category of individuals convicted of some form of unlawful sexual activity that requires registration. The panoply of registerable offenses dispels any notion

---

[4] Andrew J. Harris & Kelly M. Socia, *What's in a Name? Evaluating the Effects of the "Sex Offender" Label on Public Opinions and Beliefs*, 28 Sexual Abuse 660, 661 (2016); *see also* Gwenda M. Willis, Jill S. Levenson & Tony Ward, *Desistance and Attitudes Towards Sex Offenders: Facilitation or Hindrance?*, 25 J. Fam. Violence 545, 551 (2010) ("[i]t is well known that sex offenders do not represent a homogenous group").

[5] Christopher Lobanov-Rostovsky & Andrew J. Harris, *Reconciling Sexual Offender Management Policy, Research, and Practice*, in *Sexual Offending* 843, 853 (Amy Phenix & Harry M. Hoberman eds., 2016).

that registrants are a uniform population. *See, e.g.*, N.C. Dep't of Justice, *The North Carolina Sex Offender & Public Protection Registration Programs* 25–30 (2014), https://goo.gl/DMpIrB (listing the 41 offenses in North Carolina that require registration); *see also* Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 Harv. C.R.-C.L. L. Rev. 435, 455 (2010) (examining the various crimes that are substantially represented on state registries, "including flashers, gropers, voyeurs, prostitutes, persons who have engaged in an adult incest relationship, stalkers, and those who have committed bestiality").

2. From a crime prevention perspective, one of the most important components of registrant heterogeneity is risk of recidivism. Recidivism rates in this context can be difficult to measure, and the results often vary due to differences in defining recidivism (i.e., re-arrest versus reconviction), differences in the length of follow-up period, differences in the populations being studied, and problems of underreporting.[6]

a. Before examining the differences in recidivism risk, it is important to note that research has consistently demonstrated that "sex offenders have lower overall recidivism rates than non-sex offenders." Przybylski, *supra* note 6, at 4. In fact, most studies have concluded that the recidivism rates for sex offenders are the lowest of any offense group except homicide. *See, e.g.*, SMART Report, *supra* note 3, at 93; *cf. Doe v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016)

---

[6] Roger Przybylski, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Recidivism of Adult Sexual Offenders* 1–2 (2015), https://goo.gl/bJ3nx2.

(noting "the significant doubt cast by recent empirical studies on the pronouncement in *Smith* [*v. Doe*] that '[t]he risk of recidivism posed by sex offenders is "frightening and high"'").

The most comprehensive recidivism study, conducted in 2003 and published by the Department of Justice, examined the recidivism patterns of male sex offenders released from prisons across fifteen states in 1994.[7] Comparing the re-arrest rates of sex offenders and non-sex offenders during the three-year testing period, the researchers found that the overall re-arrest rate of sex offenders was far lower than that of non-sex offenders. Langan, *et al.*, *supra* note 7, at 24.

The study also computed the re-arrest rates of sex offenders and non-sex offenders who were arrested for a *sexual* offense after being released from prison: from the sex offender group, 5.3% (517 out of 9,691) were arrested for a new sexual offense after being released from prison; from the non-sex offender group, 1.3% (3,328 out of 262,420) were arrested for a sexual offense after being released. *Id.* Thus, out of the total number of individuals who were arrested for a sexual offense, only 13% were prior sex offenders. *See id.*

The results of the 2003 study are consistent with the findings of several state-sponsored studies. The following table catalogs the results of different state-sponsored recidivism studies and provides the percentage of released sex offenders who were convicted of (or who returned to prison for) committing a new sex offense within the study's follow-up period.

---

[7] Patrick A. Langan, *et al.*, Bureau of Justice Statistics, Dep't of Justice, *Recidivism of Sex Offenders Released from Prison in 1994* (2003), https://goo.gl/nLe1BA.

Study	New Sex Offense	Follow-up Period	Recidivism Measure
2003 Study[8]	3.5%	3 years	Reconviction
California[9]	3.2%	5 years	Return to Prison
	3.4%	10 years	
Connecticut[10]	2.7%	5 years	Reconviction
Indiana[11]	2.2%	3 years	Return to Prison
Michigan[12]	3.1%	4 years	Return to Prison
Minnesota[13]	5.7%	3 years	Reconviction
New York[14]	1.7%	3 years	Return to Prison
Washington[15]	2.7%	5 years	Reconviction

[8] Langan, *et al.*, *supra* note 7.

[9] Cal. Sex Offender Mgmt. Bd., *Recidivism of Paroled Sex Offenders – A Five (5) Year Study* 1 (2008), https://goo.gl/esBX7G; Cal. Sex Offender Mgmt. Bd., *Recidivism of Paroled Sex Offenders – A Ten (10) Year Study* 1 (2008), https://goo.gl/UwnD10.

[10] Criminal Justice & Policy Planning Div., State of Conn., *Recidivism Among Sex Offenders in Connecticut* 4 (2012), https://goo.gl/ZUcj0T.

[11] Indiana Dep't of Corr., *Recidivism Rates Compared: 2005 – 2007*, at 21–22 (2009), https://goo.gl/17NwK7.

[12] Citizens Alliance on Prisons & Public Safety, *Denying Parole at First Eligibility: How Much Public Safety Does It Actually Buy? A Study of Prisoner Release and Recidivism in Michigan* 21 (2009), https://goo.gl/ZRdEOM.

[13] Minn. Dep't of Corr., *Sex Offender Recidivism in Minnesota* 21 (2007), https://goo.gl/cXqYDR.

[14] State of New York, Dep't of Corr. & Cmty. Supervision, *2010 Inmate Releases: Three Year Post Release Follow-Up* 46–47 (2014), https://goo.gl/cC9EIQ.

[15] Wash. State Inst. for Pub. Policy, *Sex Offender Sentencing in Washington State: Recidivism Rates* 2 (2005), https://goo.gl/LRLQGi.

These studies show that the percentage of sex offenders who commit new sex offenses is low, much lower than conventional folk wisdom would have it.

b. More importantly, whatever the aggregate recidivism rates may be, "[d]ifferent types of sex offenders have markedly different rates of recidivism." SMART Report, *supra* note 3, at 102. Registrants with "no prior criminal history and clear evidence of stability and prosocial conduct in all other domains of their lives" have a much lower risk of reoffending—and therefore "require different responses"—than "[t]he minority of offenders who have a higher risk of reoffending." *Id.* at 85. Other recognized factors that contribute to disparate recidivism rates include the underlying crime of conviction,[16] the gender of the individual,[17] and his or her age at the time of release.[18] Additionally, "Internet offenders and conventional sex offenders are not synonymous groups"; they typically differ in offense history, recidivism rates, and the targets of future criminal behavior. SMART Report, *supra* note 3, at 84–85. Preliminary research indicates

---

[16] For example, one study reported a 6% sexual offense recidivism rate after 5 years for incest offenders, *see* SMART Report, *supra* note 3, at 102; another showed exhibitionists having an 11.7% recidivism rate after approximately 6.8 years, *see* Przybylski, *supra* note 6, at 4.

[17] Research has shown that female sex offenders reoffend at significantly lower rates than male sex offenders, with most studies putting their recidivism rate at approximately 1% in a five-year follow-up period. SMART Report, *supra* note 3, at 96.

[18] One study found that older sex offenders (i.e., those over age 50 when released) recidivated at less than *half* the rate of younger offenders. Andrew J.R. Harris & R. Karl Hanson, *Sex Offender Recidivism: A Simple Question* 8 (2004), https://goo.gl/nMoErU.

that "Internet offenders, as a group, have a relatively low risk of sexually recidivating compared to conventional contact sex offenders."[19] In short, as this Court has recognized, "a prediction of future criminal conduct is 'an experienced prediction based on a host of variables' which cannot be readily codified." *Schall v. Martin*, 467 U.S. 253, 279 (1984) (quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 16 (1979)).

3. The demonstrable differences among registrants shows that they are far from homogeneous. Nor should they be regulated as such, for "[t]he belief no longer prevails that every offense in a like legal category" should be addressed "without regard to the past life and habits of a particular offender." *Williams v. New York*, 337 U.S. 241, 247 (1949). Rather, as the Department of Justice has explained, "the need for tailored rather than uniform interventions, and the need to match sex offender treatment and management efforts to the risk levels and criminogenic needs of sex offenders," is imperative. SMART Report, *supra* note 3, at 119.

B. Individualized risk assessments and tailored legislation recognize the realities of sex offending.

Instead of imposing "one-size-fits-all" regulations that target a monolithic "sex offender" category, research has shown that "the effectiveness of sex offender management policies relies on the ability of

---

[19] Michael Seto, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), U.S. Dep't of Justice, *Internet-Facilitated Sexual Offending* 4 (2015), https://goo.gl/kFLiXM.

criminal justice professionals to accurately differentiate sexual offenders." *Id.* at 112.

A more thoughtful analysis of registrant regulation begins by recognizing the difference between *offense seriousness*, which refers to "the normative decision by the courts" that is "based on a level of behavior rejected by the community," and *re-offending risk*, which refers to "predict[ing] the likelihood of re-offending" through empirical analysis and professional treatment.[20] While both are important, conflating the two will result in inefficient policies that do not actually address future harm. A registrant with a low risk of recidivism will usually require a different prevention-based response than one with a higher risk of recidivism, even if the lower-risk registrant's past offense was more serious. *See* Beech, *et al.*, *supra* note 20, at 225.

To account for this distinction, several states use actuarial risk assessment methods, which provide for individualized—and therefore more effective—treatment and management decisions for each individual registrant. *See* Lobanov-Rostovsky & Harris, *supra* note 5, at 854; *see also Doe v. Sex Offender Registry Bd.*, 41 N.E.3d 1058, 1069 (Mass. 2015) (cataloging the risk-based registry requirements in Arkansas, California, Georgia, Idaho, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Texas, Vermont, Washington). These methods typically include an initial recidivism risk assessment using specific risk factors and then allow for recurring assessments to "capture changes in risk over time [for

---

[20] Anthony R. Beech, *et al.*, *The Internet and Child Sexual Offending: A Criminological Review*, 13 Aggression & Violent Behav. 216, 225 (2008).

the individual registrant] and ensure that case management strategies can be adjusted accordingly."[21]

Throughout the risk assessment process, both *static* risk factors (such as age at the time of offense, the number of previous convictions, and family history) and *dynamic* risk factors (such as sexual preferences, antisocial behaviors, hostility, substance abuse, and changes in social support mechanisms) are typically considered. *See* SMART Report, *supra* note 3, at 83, 114; *Twenty Strategies*, *supra* note 21, at 10. By conducting an individual risk assessment for each registrant, prevention policies can then target those who pose an actual threat of engaging in the disfavored predicate activity, such as "harvest[ing] information to facilitate contact" with minors. Pet. App. 13a; *see, e.g.*, Tex. Gov't Code Ann. § 508.1861(a) (West 2016) (applying a social networking ban to registrants who pose a risk of using a computer or the Internet to harm children).

Classifying registrants based on an actual, individualized assessment is not unfamiliar terrain, even in North Carolina. For some offenses, for example, North Carolina only requires defendants who are a "danger to the community" to register. *See* N.C. Gen. Stat. § 14-202(*l*).[22] The "danger to the

---

[21] Center for Sex Offender Management, *Twenty Strategies for Advancing Sex Offender Management in Your Jurisdiction* 8 (2008) [hereinafter *Twenty Strategies*], https://goo.gl/gg9iB7.

[22] *See also, e.g.*, N.C. Gen. Stat. § 14-208.6(6) (identifying a "sexually violent predator" as an individual convicted of a sexually violent offense who also "suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at strangers or at a person with whom a relationship has been established or promoted for the primary purpose of victimization").

community" label applies "only . . . to those defendants who pose a risk of engaging in sex offenses *following their release from incarceration.*" *State v. Pell*, 712 S.E.2d 189, 192 (N.C. Ct. App. 2011) (emphasis added). Thus, each individual defendant is evaluated based on his or her risk of re-offending rather than on evidence about the defendant's "past offenses," which "offer[s] very little in the way of predictive statements concerning [the] [d]efendant's likelihood of recidivism." *Id.*

Indeed, for a variety of constitutional purposes, this Court has required that risk of future harm must be "made on an individualized basis, not by means of broad classifications." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 100–01 (1972); *see also Kansas v. Hendricks*, 521 U.S. 346, 364 (1997) (upholding Kansas's Sexually Violent Predator Act in part because the state legislature had "taken great care to confine only a narrow class of particularly dangerous individuals" by requiring individualized risk assessments). Such individualization supports the imperative "belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship." *Williams v. New York*, 337 U.S. 241, 249 (1949).

C. Individualized policies and targeted legislation increase public safety and maximize the use of public resources.

Evidenced-based legislation and individualized risk-assessment policies enjoy widespread acceptance in both research and policymaking circles because such approaches enhance public safety while simultaneously using public resources more efficiently.

First, targeted legislation significantly increases public safety. Rather than applying restrictions to all registrants without regard for their individual risk factors—which has been shown to *increase* recidivism rates, *see* Lobanov-Rostovsky & Harris, *supra* note 5, at 853—evidence-based policies and individualized risk assessments can accomplish the dual goals of reducing the number of sexual offenses overall *and* rehabilitating past offenders.[23]

Second, these targeted approaches are substantially more cost-effective than "one-size-fits-all" policies, which drain public resources to mandate compliance and "take funding away from more promising programs and services for victims."[24] The amount spent prosecuting this case, for example—a case in which the State knew from the get-go that the defendant had no illicit motive, *see* Pet. Br. 10–11—could have gone to more effective prevention measures. As the Department of Justice has observed, "[B]oth public safety and the efficient use of public resources would be enhanced if sex offender management strategies were based on evidence of effectiveness rather than other factors." SMART Report, *supra* note 3, at 146.

---

[23] *See* Pamela M. Yates, *Treatment of Sexual Offenders: Research, Best Practices, and Emerging Models*, 8 Int'l J. Behavioral Consultation & Therapy 89, 93 (2013) (explaining that treatment is most effective when its intensity varies based on the level of risk posed by an individual offender).

[24] Jill S. Levenson, *An Evidence-Based Perspective on Sexual Offender Registration and Residential Restrictions*, in *Sexual Offending* 861, 866–67 (Amy Phenix & Harry M. Hoberman eds., 2016).

II. Forbidding All Registrants From Accessing Social Media Demonstrates An Overbroad And Ineffective Approach To Preventing Sexual Offenses.

The social networking ban that North Carolina imposes on all registrants exemplifies an overbroad and ineffective approach to regulating registrant conduct. By determining that all registrants—regardless of their underlying crime of conviction, prior criminal history, or recidivism risk—pose a significant threat of harvesting online information about minors, North Carolina's "one-size-fits-all" approach is based not on facts but on fear. And accompanying this approach are several collateral consequences that hamper registrants' ability to lead successful lives. "Surely, this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

A. The statute's overbreadth stems from legislating with misconceptions rather than evidence.

Although it is universally accepted that registrant regulations are effective only if they are based on empirical evidence, many—such as the one in this case—are not. Instead, they indulge misconceptions about "sex offenders," ignoring "whether the scope of the proposed [regulation] will be overly broad and inflict too-severe sentences on persons who commit less morally repugnant crimes." Paul H. Robinson, *et al.*, *The Disutility of Injustice*, 85 N.Y.U. L. Rev. 1940, 1988–89 (2010). Highly-publicized, sexually-motivated crimes tend to provoke public alarm, leading to legislation that will have little, if any, impact.

The statute in this case is a prime example—although protecting minors from sexual abuse is an

undisputedly compelling governmental objective, banning all registrants from accessing social networking websites will do very little to achieve it.[25] First, as Petitioner's brief points out, the ban applies to registrants who are registered for reasons that have nothing to do with minors or harvesting information about them. Pet. Br. 7–8. Second, most victims (93%) know their offender as either a family member or close acquaintance, not via information harvested from social networking websites.[26] Third, most offenses (85%) come from inside the home, not because of harvested information on social networking websites.[27] And fourth, most offenses (95%) are committed by a first-time offender, not by a registrant.[28]

That the State finds this data to be "astonishingly counter-intuitive" (BIO 33) further shows that the statute is based on "intuition" rather than actual evidence. Indeed, the State has not advanced *any*

---

[25] In fact, researchers in one study were unable "to find cases of sex offenders stalking and abducting minors on the basis of information posted on social networking sites," despite "[m]edia stories . . . suggest[ing] that online molesters could use the information youths post about their identities and activities to locate and stalk [them]." Janis Wolak, David Finkelhor, Kimberly J. Mitchell, & Michele L. Ybarra, *Online "Predators" and Their Victims: Myths, Realities, and Implications for Prevention and Treatment*, 63 Am. Psychologist 111, 117 (2008).

[26] Bureau of Justice Statistics, Dep't of Justice, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 10 (2000), https://goo.gl/o5xnv9.

[27] Nicole Colombino, *et al.*, *Preventing Sexual Violence: Can Examination of Offense Location Inform Sex Crime Policy?*, 34 Int'l J. L. & Psychiatry 160, 161 (2011).

[28] *Id.*

actual evidence to support the breadth of this statute. When the court below explained that the State "must do more than simply 'posit the existence of the disease sought to be cured'" and that it must instead "demonstrate 'that the regulation will in fact alleviate these harms in a direct and material way,'" Pet. App. 21a (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)), the State simply reiterated "that protection of minors from known sexual predators is a vital duty, one [the North Carolina Supreme Court] has recognized in another context," *id.*

This is not the first time that North Carolina has failed to substantiate overbroad registrant restrictions with actual data. The Fourth Circuit recently held that a prior version of N.C. Gen. Stat. § 14-208.18(a)(2), which prohibited registrants from "being" at certain locations where minors may be present, was unconstitutionally overbroad under the First Amendment given the State's "lack of data, social science or scientific research, legislative findings, or other empirical evidence" supporting its "substantial interest in protecting minors from sexual crimes." *Doe v. Cooper*, No. 16-1596, 2016 WL 6994223, at *8 (4th Cir. Nov. 30, 2016). Even after such evidence was requested, "the State explicitly declined to introduce" anything other than "anecdotal case law" and "logic and common sense." *Id.* "Without empirical data or other similar credible evidence," the court explained, "it is not possible to tell whether subsection (a)(2)—and specifically its application to offenders with only adult victims—responds at all to the State's legitimate interest in protecting minors from sexual assault." *Id.* at *9.

North Carolina's interest in protecting minors from sexual abuse is undoubtedly compelling, but

"[t]he prospect of crime . . . by itself does not justify laws suppressing protected speech." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).

B. The statute's overbreadth has damaging collateral consequences and impedes registrants' success at reintegrating into society.

Once a registrant completes his or her sentence, successful reentry into society depends upon stable and effective reintegration mechanisms. Research shows that registrants with access to stable housing, pro-social support networks, and employment opportunities are less likely to reoffend and more likely to lead normal lives. Willis, *et al.*, *supra* note 4, at 545. Policies that unduly isolate registrants from the rest of the community, on the other hand, "sacrifice a critical component of sexual abuse prevention" by increasing their risk of recidivism.[29]

Banning all registrants from social networking websites—ubiquitous mediums of social interaction that have "revolutionized the way people connect, communicate, and develop relationships"[30]—can severely stifle their post-conviction success. The magnitude of these websites is difficult to overstate; as the State acknowledged below, "If [Facebook] were a country, it would be the third most populous country on the planet." Brief for the State at 5, *State v.*

---

[29] Joan Tabachnick & Alisa Klein, Association for Treatment of Sexual Abusers, *A Reasoned Approach: Reshaping Sex Offender Policy to Prevent Child Sexual Abuse* 26 (2011), https://www.atsa.com/pdfs/Policy/AReasonedApproach.pdf.

[30] Lynn A. McFarland & Robert E. Ployhart, *Social Media: A Contextual Framework to Guide Research and Practice*, 100 J. Applied Psychol. 1653, 1653 (2015).

Packingham, 748 S.E.2d 146 (N.C. Ct. App. 2013), 2013 WL 1232022.

Given the increasingly important societal roles played by these websites, completely banning registrants from them creates a dramatic effect on registrants' efforts to lead normal lives following their sentences. Amici offer five common examples of the collateral effects that the social networking ban has had on registrants:

- John Doe #1 cannot use Facebook or Twitter even though his child's school uses them as the primary means of communication with parents. The school updates its bus schedules via Twitter and posts announcements about weekly schedules and school closings on Facebook. He is forced to rely on his child to bring home letters and announcements, which often get lost along the way. Because John's registrant status also forbids him from being on school property, social networking websites would provide an important way for him to stay up-to-date on school events and become more actively involved in his child's life.

- John Doe #2 is employed in a part-time capacity and struggles to find more stable employment. Friends and co-workers have suggested that he use the professional social networking website LinkedIn to search for better employment opportunities, which he is unable to do because of his status as a registrant. His wife refuses to use social media herself, out of fear that her own usage will somehow result in local law enforcement believing that he is violating the social media ban. In light of the ban, he finds himself limited in his

search for a more substantive job and remains underemployed.

- John Doe #3 has attempted to follow the social networking ban, but has received conflicting information from local law enforcement about what websites actually fall within the scope of the law. Because the law's text does not clearly explain which websites are prohibited, he is uncertain about the sites he can visit, and as a result limits his Internet activity far beyond what the law actually covers.

- John Doe #4 owns a small business that he wishes to advertise on Facebook, Twitter, and other social media platforms. As it has become increasingly necessary for small businesses to use social networks to reach new customers, John has struggled to advertise his business as a result of North Carolina's ban. If he could advertise on Facebook and other social media, he could grow his business and make a better living to provide more support for his family.

- John Doe #5's friends and family communicate exclusively through Facebook and Twitter. Even though his offense did not involve social media, he is cut off from them and feels "separated from society." He is concerned about the damaging effects such isolation can have on other registrants in similar circumstances and worries that they will struggle to reintegrate back into society without that connection to stable, supportive relationships.

CONCLUSION

There is unanimous professional consensus that overbroad registrant restrictions, divorced from empirical support, do not have any meaningful impact on reducing sexual offending. North Carolina's paramount interest in protecting minors from sexual abuse will only be effected through targeted legislation that is responsive to data about what is needed and what works. Unfocused legislation will not do, especially when it has the collateral effect of unnecessarily suppressing basic constitutional freedoms.

The judgment below should be reversed.

Respectfully submitted,

/s/ John J. Korzen
John J. Korzen
Counsel of Record
Wake Forest University
School of Law
Appellate Advocacy Clinic
PO Box 7206 Reynolda Station
Winston-Salem, NC 27109
336-758-5832
korzenjj@wfu.edu

DECEMBER 22, 2016